United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1051

To be argued by
PHYLIS SKLOOT BAMBERGER

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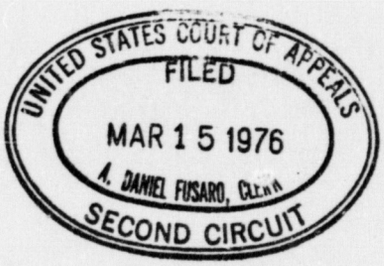
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- STANLEY SIMPSON, JOHN OLIVER BRYANT, and EARL BEST, Defendants-Appellants.	Docket No. 76-1051 Docket No. 76-1052 Docket No. 76-1053

BRIEF FOR APPELLANT
STANLEY SIMPSON

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish beyond a reasonable doubt that appellant Simpson knew that Best and Bryant intended to rob a bank and that he aided the plan.

2. Whether the Judge's refusal to permit counsel to examine the presentence report and the report prepared after the study requires vacature of the sentence and a new sentencing procedure.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Irving Ben Cooper) entered on January 13, 1976, convicting appellant Stanley Simpson, after a trial before a jury, of aiding and abetting his co-defendants, John Oliver Bryant and Earl Best, in their entry into a Manufacturers Hanover Trust Company bank branch when they had intent to rob it (18 U.S.C. §2113(a)). Appellant Simpson was sentenced to a term of twelve years' imprisonment, and the provisions of 18 U.S.C. §4208(a) were made applicable.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel for appellant Simpson on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Simpson was indicted with John Oliver Bryant and Earl Best for conspiracy to rob a bank and for entry into a Manufacturers Hanover Trust Company bank branch with intent to rob it.[1]

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[1] The indictment is B to the joint appendix to appellants' briefs. It was uncontradicted that the bank was insured by the FDIC (135, 139, 146). Simpson was acquitted of conspiracy.

According to the evidence produced at trial, on April 24, 1975, at about 1:20 p.m., a New York City policeman observed two men, Best and Bryant, stop in front of a Chemical Bank branch at Fifth Avenue and 20th Street,[2] peer into the bank's windows (149[3]), and walk back and forth around the bank (150). Bryant then entered the bank (78, 151) and Best walked three-quarters of a block east on 20th Street between Fifth Avenue and Broadway (152-153) to a tan Pontiac (263), the motor of which was running. The car was apparently at the curb (267). Best spoke with appellant Simpson (265), who was sitting in the car (79, 154). There was no evidence as to what Simpson and Best spoke about. Best then crossed to the other side of 20th Street.

As to what happened next, the testimony was inconsistent. Police officer William Henry said Best crossed to the other side of 20th Street and stopped, facing west toward the bank. Best received a signal (418-420, 424) from Bryant, who had come out of the Fifth Avenue door of the bank (154). Best returned to the car, spoke to Simpson, walked to Fifth Avenue, and headed north with Bryant. Officer John Reddy said nothing about a signal and saw only that Best joined Bryant and that

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[2] Government Exhibit #1 was a map showing the streets involved. The map is reproduced as a foldout exhibit at the end of this brief.

[3] Numerals in parentheses are references to pages of the trial transcript.

the two men walked north on Fifth Avenue (155). Police officer William Galluba's testimony was that after Simpson and Best spoke (263) he saw Best walk toward Bryant (263), turn and start back toward the car, make a gesture toward the car, and walk away (266). From this point on, there is no association at all between Simpson and the other two men.

Best and Bryant then walked to a nearby Chase Manhattan Bank branch at 23rd Street and Fifth Avenue, peered through a front window (158), and walked away (159).

Best and Bryant next walked five blocks south and entered a Manufacturers Hanover Trust Company branch at 18th Street and Fifth Avenue (86, 159-160). Best went to the teller feeder line and Bryant spoke to the bank guard (86, 160). Bryant had his left hand in his coat pocket and his right arm around the guard's waist with his hand near the guard's gun (87, 161).

Best left the bank, apparently because he felt someone was watching him (421-422), and was arrested and frisked (89, 131). No weapon was found (101).

A few feet up the street Bryant was arrested as he left the bank (89). Bryant was frisked (162), and a practice hand grenade (Exhibit #18) without firing powder and without a functioning firing pin (163, 165, 411-412) was found. As Best walked with the police officer toward Bryant, he dropped a slip of paper to the ground (91-92, 103). This was a note (Exhibit #17) (404) which read:

FREEZE: KEEP HANDS IN VIEW: DON'T TRY ANYTHING, OR YOU WILL DIE: I HAVE A BOMB::: PUT ALL MONEY ON TOP BIG BILLS FIRST:

NOW, WHEN YOU FINISH AND I GO WAIT FIFTHTEEN [sic] MINUTES BEFORE YOU DO ANYTHING YOU WILL BE WATCHED.

It was the conduct at the Manufacturers Hanover Trust Company bank which was the subject of the second count in the indictment. Appellant Simpson had nothing to do with these activities. While Best and Bryant were involved at the Chemical Bank and the Manufacturers Hanover Trust bank, Simpson remained at the parked car on 20th Street between Fifth Avenue and Broadway, from which location he was unable to see Best and Bryant. It was uncontradicted that the car belonged to a friend of Simpson's who had lent it to him for the day (467)[4]. Simpson got out of the car, walked to the corner and returned to the car, a little later got out of the car and rested his arm on the door (267), and got back into the car (268). After about three minutes he drove off (268). Police officer Galluba followed the car, lost sight of it, and then found it parked and locked at 19th Street and Irving Place (301), one block north and two and a half blocks east of the Manufacturers Hanover Trust bank. Officer Galluba saw the butt of a gun and

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[4]The owner of the car, Marian Wilkins (467), was Simpson's girlfriend. She was the confidential secretary to the director of the New Jersey Division of Consumer Affairs.

some papers protruding from beneath the driver's seat (301-302). It was uncontradicted that the gun was a plastic toy belonging to one of the six children of the owner of the car (468) and that it had been in the car for four months (469).[5]

The police officers saw Simpson walk up 19th Street, then turn away and walk up Irving Place. Simpson was arrested away from the car and several blocks from the Manufacturers Hanover Trust Company branch involved (906). He was found to be in possession of a key to the car (307).

After Simpson, Best, and Bryant were arrested, they were interviewed by an FBI agent. Simpson denied knowing either Best or Bryant.

Best's fingerprints (378) were found on three pieces of paper (Exhibits #8-A, #8-B, #8-C) (377) found in a wallet (Exhibit #7) in the front seat of the car (352, 353). Further, Best's name and telephone number were found on the first page (Exhibit #15-A) of a note pad (Exhibit #15) (365) taken from appellant Simpson when he was arrested.

In Best's statement to the police, admitted into evidence, Best admitted that he decided to rob a bank, that he typed the note and obtained the grenade, and that he traveled from New Jersey to New York on PATH trains and that he went to the bank

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[5]It was stipulated that four coats (Exhibits #9-#12) and a leather pouch were found in the trunk of the car (352-354). Ms. Wilkins identified the leather pouch (Exhibit #13) as her purse which she had left in the trunk (470-471). It was uncontradicted that the four coats belonged to Ms. Wilkins' former husband, that they were wrapped in plastic, and that they were to be returned to the husband's mother (471-472).

with a person he had just met whose job it was to engage the bank guard while Best presented the note to the teller (418-424).

At the conclusion of the evidence counsel made a motion to acquit (489-491). The motion was denied (492).

Judge Cooper instructed the jurors that appellant Simpson could be found guilty under Count Two of the indictment as an aider and abetter.[6]

The jury began deliberations at 5:15 p.m. on September 8, 1975 (655), and continued deliberating until 10:40 p.m. (659) with one interruption for a question. At about 10:40 p.m., the jurors advised the Court that a verdict had been reached on two of the defendants but not as to the third (660). Judge Cooper, with consent of all the parties, agreed not to take a partial verdict (661).

Deliberations re-commenced at 10:10 a.m. the following day, during which the jurors asked for the testimony about Best's confession (666). At 3:30 p.m., the jurors notified the Judge that they were deadlocked eleven to one as to one defendant, and indicated that they did not know what to do (673).

Counsel for appellant Simpson objected to any Allen charge and requested an immediate verdict. If an Allen charge was to be given, counsel requested that the jurors be told only that they should continue to deliberate (675, 679).

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[6]The complete charge is C to the separate joint appendix.

A full Allen charge was given, and the jurors reached a verdict at 6:[illegible] p.m. Appellant Simpson was acquitted of the conspiracy (689), and was convicted of aiding and abetting the entry into the bank with intent to rob it.

On the date set for sentencing, October 9, 1975, counsel requested permission to see the presentence report. The Judge denied the motion, saying:

> The application is denied. It has been my policy always to regard the probation report as a report from the probation department to the judge, and it is a confidential report.
>
> However, I always have in my years as a judge acquainted the defendant and his lawyer at the time of sentence with respect to any matter of significance that was not brought out before me during the course of the trial. There is no such item here. Therefore, I see nothing gained by turning it over.
>
> I go pretty much on the general behavior pattern of each one of these defendants. A reci[t]al of education, work record, matters of that kind, prior criminal acts, and so forth. But there has been no additional serious charges other than what such a general approach would reveal.
>
> (700-701).

Judge Cooper then sentenced appellant Simpson to a ninety-day study. On January 13, 1976, appellant Simpson was returned to the court for sentence. Again counsel requested permission to examine the presentence report and the report of the study. Again the application was denied:

> Counsel, may I assure you that I shall announce what are the factors on which I

> predicate my sentence. In other words, the report does not have any impact whatever upon me other than the factors that I shall choose to make mention of.
>
> (722-723).

The record shows that counsel had been told by the psychiatrist that appellant Simpson was not a danger to society. On the other hand, Judge Cooper indicated that the report had said he was a danger (723, 729).

During the course of both sentencing procedures, Judge Cooper engaged in long tirades against Simpson and against all three defendants collectively. The transcripts of the two sentencing proceedings are D and E, respectively, to the separate joint appendix, and are quoted, infra, at 23.

Judge Cooper imposed a twelve-year term of custody.

ARGUMENT

Point I

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANT SIMPSON KNEW THAT BEST AND BRYANT INTENDED TO ROB A BANK, OR THAT HE AIDED THAT EFFORT.

Appellant Simpson, Bryant, and Best were charged with entry into the Manufacturers Hanover Trust Company with intent to rob it. Since Simpson had not entered that or any other bank, the Government premised his guilt on a theory of aiding and abetting. The law is clear that an aider and abetter must not only be associated with a scheme in such a way as to make it succeed (United States v. Peoni, 100 F.2d 406 (1934)), but also must have the knowledge and intent required to commit the basic violation. United States v. Calabro, 467 F.2d 973, 982 (2d Cir. 1972); United States v. Howell, 447 F.2d 1114, 1117 (2d Cir. 1971); United States v. Gallishaw, 428 F.2d 760, 763 (2d Cir. 1970); United States v. Garguilo, 310 F.2d 249, 252-253 (2d Cir. 1962). Here, taking the evidence most favorable to the Government and considering the uncontradicted testimony presented by the defense, United States v. Johnson, 513 F.2d 819, 821 (2d Cir. 1975), there is insufficient evidence to show beyond a reasonable doubt that appellant Simpson knew that Bryant and Best entered the bank branch, or indeed any bank, to rob it, or that he aided that endeavor. United States

v. Gallishaw, supra; United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

All three police officers -- Henry, Reddy, and Galluba -- testified that Best and Bryant walked toward Fifth Avenue and 20th Street along 20th Street, that the two men remained on the corner looking around, that Bryant entered the Chemical Bank branch, and that Best then walked east along 20th Street, where he stopped midway in the block to speak to Simpson, who was sitting in a parked car with the motor running (154, 320). Simpson's presence in the car and his contact with Best become probative of the knowledge of Best's plan or of aid to that plan only if other circumstances tie him to a plan to rob a bank. United States v. Johnson, supra; United States v. Stewart, 451 F.2d 1203 (2d Cir. 1971); United States v. Kearse, 444 F.2d 63, 65 (2d Cir. 1971); compare United States v. Hopkins, 486 F.2d 360 (9th Cir. 1973).

However, there is no evidence as to what Best and Simpson spoke about.[7] In fact, Officer Galluba testified that he did not know whether they spoke (320). There is no evidence that

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[7] The contents of the conversation is critical, for even language which indicates that criminal conduct was afoot may not necessarily give a person the specific knowledge required. See United States v. Stromberg, 286 F.2d 256, 267 (2d Cir.), cert. denied, 361 U.S. 863 (1959) (portion of opinion relating to Samuel and Davis).

Simpson, from his position inside the car on the north side of 20th Street, saw Bryant enter the Chemical bank[8] or that he knew that is where Bryant went. Nor is there anything to show that Simpson saw either the note or the grenade Best acknowledged he had prepared for the plan. Contrast United States Sisca, 503 F.2d 1337, 1342 (2d Cir. 1972) (concerning the defendant McBride).

As to what happened next, the testimony of the policemen is inconsistent. Officer Henry said that Best crossed to the other side of 20th Street and stood facing the bank, received a signal from Bryant who had come out the Fifth Avenue door of the bank (154), returned to the car, spoke to Simpson, returned to Fifth Avenue, and headed north. Officer Reddy said nothing about a signal, and saw only that Best joined Bryant and both men walked north on Fifth Avenue. Again, there is nothing to show what Simpson and Best spoke about.

Officer Galluba's testimony was that he saw Simpson and Best speak (263), saw Best walk toward Bryant (263), noted that Best turned and walked back toward the car, gestured toward the car, and walked away (266).

Even if it is assumed that Best and Simpson had a second conversation or that Best gestured toward Simpson, there is

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[8]Officer Henry testified that, from his vantage point on 20th Street and Broadway, he observed Bryant leave the bank at 20th Street and Fifth Avenue. There is no basis for assuming that Simpson, sitting in the car, could see Bryant (315).

nothing to show that these events had anything to do with a bank robbery or the later entry into the Manufacturers Hanover Trust branch with intent to rob it. From the cards found in the car it can be assumed that Best and Simpson knew one another, even that there was some interchange of ideas. However, mere association is not sufficient to show knowledge, and there is nothing in the record to show that the contacts between Best and Simpson would have given Simpson any knowledge of the plan. United States v. Johnson, supra, 513 F.2d 819;[9] United States v. Turnipseed, 272 F.2d 106 (4th Cir. 1959); see United States v. Baratta, 397 F.2d 215, 224 (2d Cir.), cert. denied, 393 U.S. 939 (1968).

Next Bryant and Best proceeded uptown to the Chase Manhattan Bank and downtown to the Manufacturers Hanover Trust bank. They entered the latter, and that entry became the subject of the indictment. Simpson had nothing to do with these activities. He remained at the car, venturing out only twice -- once to walk to Fifth Avenue, once to stand next to the car. He then drove the car to 19th Street and Irving Place -- several blocks from

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[9] Innocent explanations for the presence of a defendant at the scene of illegal conduct can serve either to bolster the claim of lack of knowledge and participation (Kearse, waiting for drugs; Johnson, friend of the defendant; Stewart, chauffeur to the seller) or to defeat it by its incredibility (United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974). However, the absence of such an explanation cannot result in a finding of guilt beyond a reasonable doubt.

the Chase Manhattan Bank branch and the Manufacturers Hanover Trust Company branch involved -- parked the car, locked it, and walked to 18th Street and Park Avenue South. He then returned to the car. The record reveals no evidence to demonstrate that Simpson knew where Bryant and Best went or that they knew where he was. Indeed, it points to the contrary: Simpson had no idea where Best and Bryant had gone.

These circumstances not only refute any assertion that Simpson knew what was happening, but also lay to rest the inference that Simpson was a lookout or the driver of what was to be the getaway car. Indeed, the record shows that the car was never intended to be an escape vehicle, for even at the beginning of the story the car was parked half a block away from the bank Bryant first entered. No intent to use the car for a speedy departure from the scene can be implied from these facts. Compare United States v. Hopkins, supra; United States v. Simmons, 281 F.2d 354, 360 (2d Cir. 1960). Further, the coats discovered in the car's trunk, by uncontradicted testimony owned by the former husband of the car's owner (semble as to treatment of uncontradicted defense testimony United States v. Kearse, supra, 444 F.2d 62), could not have been part of any plan to escape: they were wrapped in plastic and not quickly available since they were in the car's trunk.

Other evidence in the case gives no additional link between Simpson and a bank. The uncontradicted testimony was

that the gun found in the car belonged to the five-year-old child of the car's owner and that it had been in the car four months. There is no testimony that Simpson ever touched the gun or talked about it.

Simpson's false exculpatory statement that he did not know Best likewise adds nothing to the proof that Simpson knew that Best and Bryant were planning to rob a bank.[10] At the time Simpson made this claim in response to interrogation, he was in custody and knew he was in custody for investigation of a possible robbery (363). His hope was to extricate himself from whatever Best had done with his other associate. United States v. Johnson, supra; United States v. Kearse, supra.

Simpson's presence and conduct do not show knowledge of the plan by Bryant and Best to enter the Manufacturers Hanover Trust Company branch or any other bank to rob it. Nor do they show any act in aid of the plan. Accordingly, the judgment against Simpson must be reversed.

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[10] While the cards found in the borrowed car indicate that Simpson knew Best, there is nothing to show that he knew Bryant. Thus, Simpson's assertion that he did not know Bryant was not shown to be false. Further, his unfamiliarity with Bryant is consistent with Best's statement that he had met Bryant only that day shows Simpson's lack of connection with the crime.

Point II

THE JUDGE'S REFUSAL TO PERMIT COUNSEL TO EXAMINE THE PRESENTENCE REPORT AND THE REPORT PREPARED AFTER THE STUDY REQUIRES VACATURE OF THE SENTENCE AND A NEW SENTENCE PROCEDURE.

At the time of the initial sentencing proceeding held on October 9, 1975, in which Judge Cooper sent appellant Simpson for a study, counsel requested permission to examine the presentence report. The Judge denied the request. Again, on January 13, 1976, counsel requested permission to examine the report, and asked also to see the study prepared pursuant to the earlier court order. This request was again denied. The Judge's refusal to permit counsel to examine the reports was error requiring vacature of the twelve-year sentence imposed. Further, the Judge's demeanor toward the defendants shows he could not objectively evaluate them in a new sentence procedure, and the sentencing must be before a different judge.

When, on October 9, 1975, counsel asked to examine the presentence report, Judge Cooper said:

> The application is denied. It has been my policy always to regard the probation report as a report from the probation department to the judge, and it is a confidential report.
>
> However, I always have in my years as a judge acquainted the defendant and his lawyer at the time of sentence with respect to any matter of significance that was not

> brought out before me during the course of the trial. There is no such item here. Therefore, I see nothing gained by turning it over.
>
> I go pretty much on the general behavior pattern of each one of these defendants. A reci[t]al of education, work record, matters of that kind, prior criminal acts, and so forth. But there has been no additional serious charges other than what such a general approach would reveal.
>
> (700-701).

Judge Cooper's policy of not permitting counsel to examine the report is contrary to Rule 32(c) of the Federal Rules of Criminal Procedure as it read prior to the 1975 amendment of the Rule:[11]

> [When the Federal Rule says] that the sentencing court "may disclose" the pre-sentence report, it certainly was intended that the sentencing court exercise its discretion in each case.... It is equally clear that when a judge states, as he did here, that in effect his policy is never to disclose pre-sentence reports, that is not an exercise of discretion on an individual basis.... Discretion under Rule 32(c)(2) must be exercised on a case-by-case basis, not by a blanket policy of non-disclosure.
>
> United States v. Brown, 470 F.2d 285, 287-288 (2d Cir. 1972).

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[11] The Rule, in relevant part, stated:

> The Court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the pre-sentence investigation and afford an opportunity to the defendant or his counsel to comment thereon.

This required exercise of discretion was based on the critical importance the report has in the sentencing decision (United States v. Rosner, 485 F.2d 1213, 1230-1231 (2d Cir. 1973), cert. denied without prejudice, 417 U.S. 950 (1974); United States v. Manuella, 478 F.2d 442 (2d Cir. 1973); United States v. Warren, 453 F.2d 738, 743-744 (2d Cir.), cert. denied, 406 U.S. 944 (1972); United States v. Malcolm, 478 F.2d 442 (2d Cir. 1973)) and of the possibly disastrous effects of an error of fact or omission in the report. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Malcolm, supra, 432 F.2d at 815-816; see also United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973). To prevent any such injustice, this Court has not only required an exercise of discretion, but a preference for disclosure, United States v. Virga, 426 F.2d 1320 (2d Cir. 1970), cert. denied, 402 U.S. 930 (1971); United States v. Holder, 412 F.2d 212 (2d Cir. 1969); United States v. Fischer, 381 F.2d 509 (2d Cir. 1967), cert. denied, 390 U.S. 973 (1968), so as to permit defendants to correct errors, present new information, and clarify facts in a manner deemed appropriate by the court. United States v. Rosner, supra, 485 F.2d at 1230-1232; United States v. Malcolm, supra. Here, the Judge's policy precluded all such procedures.

On January 13, 1976, when appellant Simpson was returned to court for imposition of sentence after completion of the study, counsel again requested permission to examine the pre-sentence report, and added a request for the report prepared

pursuant to the study.[12] Judge Cooper denied the request, stating:

> Counsel, may I assure you that I shall announce what are the factors on which I predicate my sentence. In other words, the report does not have any impact whatever upon me other than the factors that I shall choose to make mention of.
>
> (723).

Judge Cooper was again incorrect, because Rule 32 had been amended to require that counsel be permitted to see the report upon request.[13]

On July 31, 1975, the Federal Rules of Criminal Procedure Amendments Act of 1975 (P.L. 94-64; 80 Stat. 370) became law. The statute modified Rule 32 of the Federal Rules of Criminal Procedure and made it effective as of December 1, 1975. The amended rule reads:

> Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information

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[12] Counsel said: "I did not see the presentence report -- I understand your Honor's policy with respect to that -- nor did I see the results of [sic] study and, for the record, I would like to make a request to see that at this time" (722).

[13] Indeed, such an amendment was promulgated by the Supreme Court on April 22, 1974, but its effect was delayed by Congress when it was decided that the changes in Rule 32 and others required additional study. H.R.Rep. No. 94-247, 94th Cong., 1st Sess., at 2.

> obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.
>
> Rule 32(c)(3)(A), Fed.R.Cr.P.

The House of Representatives report (No 94-247, 94th Cong., 1st Sess.) on the proposed legislation (H.R. 6799) made clear the function of the new provision. First, the report discussed the amendment as it came from the Supreme Court in its order dated April 22, 1974:

> ... Upon the defendant's request, the court must permit the defendant to read the presentence report, except for the recommendation as to sentence. However, the court may decline to let the defendant read the report if it contains (a) diagnostic opinion that might seriously disrupt a rehabilitation program, (b) sources of information obtained upon a promise of confidentiality, or (c) any other information that, if disclosed, might result in harm to the defendant or other persons.[14] The court must give the defendant an opportunity to comment upon the presentence report. If the court decides that the defendant should not see the report, then it must provide the defendant, orally or in writing, a summary of the factual information in the report upon which it is relying in determining sentence.
>
> Report at 17.

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[14] Obviously, the District Judge made no determination as to whether the exceptions were applicable here.

Then the Report states that the House Judiciary Committee added to the defendant's opportunity to participate in the information-producing process:

> The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdivision (c)(3)(A) will help insure the accuracy of the presentence report.

Further, the revision went so far as to include within its disclosure requirement the special presentencing studies authorized by 18 U.S.C. §§4208(b), 4252, 5010(e), or 5034. Rule 32(c)(3)(E).[15] Thus, counsel was entitled to examine all the reports used for sentencing. The need for such examination is exemplified here, for there was a dispute as to the psychiatrist's opinion with respect to Simpson's danger to the community. As this Court had earlier, Congress recognized the need for accurate sentencing information and for the opportunity for the defendant to assure himself that the court was not imposing sentence based on errors, omissions,

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[15] It is clear that the court used the study report in sentencing (722, 729, 733, 736).

or inadequate information.[16]

Since both sentencing procedures were invalid because counsel was denied the opportunity to see the report the sentence must be vacated and Simpson sentenced anew. Further, an examination of the two sentencing proceedings in this case demonstrates the need to have the new sentencing procedure conducted by a different district judge. On two occasions Judge Cooper used sentencing procedures contrary to the law. United States v. Brown, supra, 470 F.2d at 288. Further, not only will it be difficult for the judge, "having once made up his mind," to resentence the defendant (United States v. Rosner, supra, 485 F.2d at 1231, citing from Mawson v. United States, 463 F.2d 29 (1st Cir. 1972)), Judge Cooper was so vituperative toward Simpson that there is no basis for believing that he could impose a sentence fairly reached in an objective, rational manner. Thus, at the time of the first sentencing, when Judge Cooper asked appellant Simpson if he had anything to say and Simpson responded by advising the Judge about his employment possibility and his desire to care for his child, Judge Cooper launched into a tirade:

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[16] Further, Judge Cooper did not even follow his own improper procedure. He said he would announce the factors on which he would predicate his sentence. He failed to do so except to make a general reference to Simpson's criminal history and unemployment.

> Do you know that I look upon you as an unbelievable creature who would dare do what you did to that little girl? That's your love as a father? You give me that stuff and you want me to eat it?
>
> I have been on my own since I was ten. I have seen rot, I have seen hunger, in my time. I have seen people physically crippled rise to the heights. And I look upon you, your body, the strength that you've got, and how you have wasted it all and the years you have spent in jail already, your own criminal record. So you've got a little child. That didn't stop you. That child, who has to grow up, I wonder whether you ever stopped to think what it would mean to that child if her classmates got to learn that her papa was a cheap, two-bit punk who had gone to jail over and over again, and her schoolmates would laugh at her and jeer her.
>
> And I've seen them in my time go to an insane assylum as a result of that torment. You did it to her, not the Judge. You, no one else but you. So when you give me that stuff I gag, I can't take it.
>
> Is there anything else you want to say to me?
>
> (704).

The record reflects that subsequent to this statement both the co-defendants waived their right to allocution. It is likely the Judge's speech produced that silence.

The same attitude was reflected in the Judge's comments made three months later. After referring to his own history of lawful conduct, the Judge remarked:

> You've got a low I.Q., fellow. You are a fairly ignorant man. You either face it or you don't. You haven't got a real brain because you didn't use your brain.
>
> (729).

He said the three defendants had a criminal course of conduct of almost daily pursuit (733), and that they were saturated with a demonstrated criminal instinct (733). He said they were "morally bankrupt," with "potential that ... is also within the orbit of the bankruptcy" (735), and that the public had a right to have them out of the way until they were clean (735).

Without determining the correctness of Judge Cooper's statements, it is apparent that they reflect a deeply held adverse opinion with respect to appellants Simpson, Best, and Bryant. There is no basis for concluding that on resentence Judge Cooper would be able to sentence as if he had not done so before. United States v. Manuella, supra. This would render meaningless the examination by counsel of the presentence report and the medical report, and any comments or additional information counsel might have to present to the court. In these circumstances, there would be no actual justice or appearance of justice were Judge Cooper required to make the sentencing decision again. Accordingly, a different district judge should be required to impose sentence.

Point III

APPELLANT SIMPSON INCORPORATES ANY ARGUMENTS OF APPELLANTS BEST AND BRYANT WHICH ARE NOT INCONSISTENT WITH THE ARGUMENTS RAISED ON APPELLANT SIMPSON'S BEHALF.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the indictment dismissed. Alternatively, the sentence must be vacated and the case remanded to a District Judge other than Judge Cooper for resentence.

Respectfully submitted,

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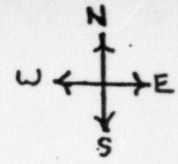
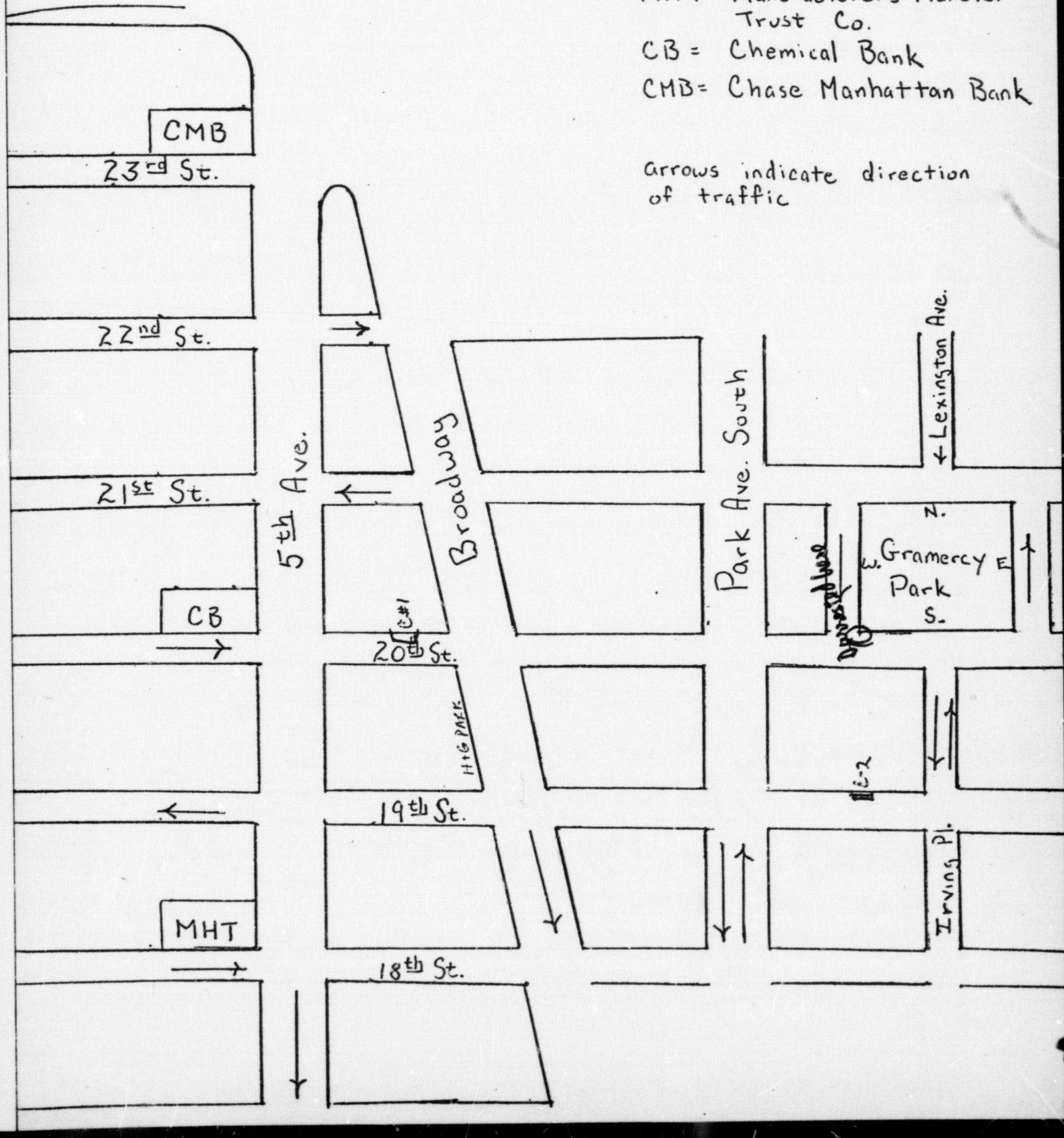
March 15, 1976

joint exh # 1 in evid.



MHT = Manufacturers Hanover Trust Co.
CB = Chemical Bank
CMB = Chase Manhattan Bank

Arrows indicate direction of traffic



CERTIFICATE OF SERVICE

I certify that a copy of this brief and appendix has been mailed to each of the following persons:

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